

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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UNITED STATES OF AMERICA,	)	
	)	
	)	
	)	
v.	)	Case No. 1:21-cr-138
	)	
AARON MOSTOFSKY,	)	<b>Judge James E. Boasberg</b>
	)	
Defendant.	)	

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**DEFENDANT MOSTOFSKY’S MOTION TO COMPEL PRODUCTION OF DEVICE**

Defendant Mostofsky, through his counsel, files this motion to compel the production of his mobile phone, pursuant to Federal Rule of Criminal Procedure 16. The government’s handling of this issue has been significantly misleading and inappropriate.

In the last status conference on June 25, Mostofsky advised the Court that although he was indicted in February, he still had not received a copy of the content from his seized mobile phone. The Court will recall that the government attempted to put the content on a hard drive but that the drive does not function properly and the data cannot be accessed. In addition, while the government has produced certain chats and audio files from the device, they are just a selection made by the government and are also cumbersome to review on the government’s discovery website. Accordingly, Mostofsky requested that the government return the phone itself. The third Assistant U.S. Attorney assigned to this matter sent Mostofsky’s counsel the template form used by the U.S. Attorney’s Office for this district to negotiate the return of a seized device before trial. It is attached as Exhibit 1.

The “standard” device return form requires the defendant to waive certain evidentiary objections at trial in order to secure the return of his property. Exh. 1. However, it is ambiguous

as to whether, after signing the form, the defendant may object that an “image” used by the government at trial was not actually extracted from his device. Mostofsky raised this ambiguity during the June 25 hearing. Afterward, counsel wrote to the AUSA as follows:

You’ll recall that Judge Boasberg said it was reasonable to clarify in the phone return stipulation that a defendant does not waive the right to object that an image is not actually from his device. The judge said that in such a case, the government would simply have an agent testify about the process for extracting the image and would compare the image at issue with the original Cellebrite extraction.

Is the government amenable to making that clarification in the stipulation? If so, I will propose an edit. Thank you.

Exh. 2.

On June 28, the government responded as follows:

No edits to government prepared stipulation.  
Your issue about what if something is not from the phone...*I believe the Judge was commenting that if it were not from the phone, then the stipulation would not apply. Re-read the stipulation; it applies only to data/images taken from the device.*

If you are still unsure, please reach out to DC-FPD, most of whom have no issues with stipulation.

Exh. 3 (emphasis added).

On June 29, Mostofsky’s counsel returned an executed device return stipulation. Counsel noted in the email containing the executed stipulation that Mostofsky signed the stipulation “based on [the government’s] representation” on June 28 that the stipulation “applies only to data/images taken from the device” which would preserve the defendant’s right to object if an “image” presented by the government were not actually taken from the device, through human error, for example. Exh. 4. The executed stipulation contained electronic signatures. Exh. 5.

Later that day, the government responded, “We need actual signatures on the form.” Exh. 6. Attaching a new stipulation document, the government added, “I’ve signed this one that is amended to include both search warrants and also references attached receipt form.” *Id.*

(emphasis added). In another email sent shortly thereafter, the government reattached the new stipulation and represented, “*This one does not have a typo in the first paragraph. Sorry for inconvenience.*” Exh. 7 (emphasis added).

On June 30, counsel held an in-person meeting with Mostofsky. Based on the government’s representation that it merely needed an “actual signature” on the stipulation the defendant had already executed and in which the government had merely fixed a “typo,” counsel printed the government’s “new stipulation” and prepared to have Mostofsky sign it. At this point, counsel noticed that the the government had actually made substantive changes to the template stipulation Mostofsky had already executed. These did not consist of typo-fixing. The government’s “new stipulation” is attached as Exhibit 8. Specifically, the government had added this paragraph:

Accordingly, the parties AGREE and STIPULATE as follows:

1. The Images are accurate duplicates of the Digital Media and were created using reliable methods or Defendant waives the right to object to the admissibility of the Images of the Digital Media and the right to question witnesses or make arguments concerning the reliability of the methods used to create the Images.

Exh. 8.

The Court will notice several things about this change. First, this substantive edit was not described in the government’s emails to counsel which instead described a fix to a “typo” and inclusion of references to multiple warrants. Second, the government’s substantive addition to the stipulation is completely inconsistent with (a) the government’s prior representation that if an “image” “were not from the phone, then the stipulation would not apply” to an authenticity objection by Mostofsky, Exh. 3, and (b) counsel’s written remark to the AUSA that Mostofsky was executing the stipulation “based on [the] representation” in point (a). Exh. 4.

Finally, the Court will notice that after Mostofsky returned an executed document on the U.S. Attorney's Office's standard device return form, an agreement between the parties was formed based on offer and acceptance. Exh. 5. Accordingly, Mostofsky advised the government on June 30 that the furtive addition of the new language, beyond being seriously misleading, was also too late as the parties had a complete agreement on return of the phone. Counsel also noted that the new language is not even found in the government's standard device return form. Exh. 1. This was the government's response: the parties did not have any agreement and Mostofsky was trying to "pull something."

The government changed the language of the parties' agreement, after it had been made, and then asked counsel to have his client sign the amended agreement. It did not disclose that the agreement had been substantively edited and in a manner directly inconsistent with their previous understanding. The altered agreement would have caused the defendant to waive evidentiary trial rights. That is grossly inappropriate. At the least, the Court should order the government to promptly return the device based on the parties' agreement to the standard device return form used in this district.

Dated: June 30, 2021

Respectfully submitted,

/s/ David B. Smith

David B. Smith, D.C. Bar No. 403068  
David B. Smith, PLLC  
108 North Alfred Street, 1st FL  
Alexandria, Virginia 22314  
(703) 548-8911 / Fax (703) 548-8935  
dbs@davidbsmithpllc.com

Nicholas D. Smith, D.C. Bar No. 1029802  
David B. Smith, PLLC  
7 East 20th Street, Suite 4R  
New York, NY 10003  
(917) 902-3869

nds@davidbsmithpllc.com  
*Counsel to Mostofsky*

**Certificate of Service**

I hereby certify that on the 30th day of June, 2021, I filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF user(s):

Graciela Lindberg  
Assistant United States Attorney  
555 4th Street, N.W.  
Washington, D.C. 20530

And I hereby certify that I have mailed the document by United States mail, first class postage prepaid, to the following non-CM/ECF participant(s), addressed as follows: [none].

/s/ David B. Smith  
David B. Smith, VA Bar No. 25930  
David B. Smith, PLLC  
108 North Alfred Street, 1st FL  
Alexandria, Virginia 22314  
(703) 548-8911 / Fax (703) 548-8935  
dbs@davidbsmithpllc.com

# EXHIBIT 1

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	<b>CRIMINAL NO. 21-MJ-123</b>
<b>v.</b>	:	
	:	
<b>AARON MOSTOFSKY</b>	:	
	:	
<b>Defendant.</b>	:	

**SECOND STIPULATION REGARDING RETURN OF DIGITAL MEDIA EVIDENCE  
AND ADMISSIBILITY AND USE OF DIGITAL MEDIA EVIDENCE**

The United States of America, by and through the undersigned, and defendant ARRON MOSTOFSKY (“Defendant”), by and through his counsel listed below, hereby agree and stipulate as follows:

**RECITALS**

On or about January 12, 2021, pursuant to Eastern District of New York Search Warrant, Case No. 21-M-28, and subpoena, government agents seized the defendant’s digital device belonging from Neil Mostofsky after executing a search warrant at the defendant’s residence for said device among other evidence. See attached Receipt for Property incorporated by reference in this Stipulation.

Defendant seeks return of specified digital media described below (the “Digital Media”).

Following this seizure, the government has imaged the Digital Media. The government has conducted and will continue to conduct a search of the imaged Digital Media (the “Images”).

The government intends to use materials discovered as a result of those searches as evidence in the pending and ongoing investigation and prosecution including, possibly, introducing those materials into evidence at trial or other proceedings.

Defendant has requested the return of the Digital Media listed below, and in the interest of expediting the return of the seized equipment and evidence, has agreed to stipulate to the following terms applicable to the specified Digital Media – itemized in the attached receipt.

### **DIGITAL MEDIA**

The Digital Media for which Defendant seeks return consist of Samsung Galaxy mobile phone/device, that was seized on January 12, 2021 from Neil Mostofsky.

### **STIPULATION**

Accordingly, the parties AGREE and STIPULATE as follows:

1. The government has agreed to return the Digital Media to defendant or defense counsel now that the Images of the Digital Media have completed.
2. The government will retain the Images of the Digital Media, including all evidence thereon, for use at trial and any other proceedings in this matter.
3. The Images of the Digital Media and/or any other copies are admissible at trial or any other proceeding in this matter to the same extent as the original Digital Media and evidence thereon (including original hard drive and computer disks), including but not limited to copies of the hard drive and printed copies of matters from the Digital Media.
4. Defendant waives any and all objections, and will not object, to the admissibility of the Images (and/or any portion of thereof) from the Digital Media on the grounds of foundation, authentication, and/or that the images are duplicates of, or not the original Digital Media, and/or any other objection under Articles IX and X of the Federal Rules of Evidence.
5. The government may retain and continue to examine the Images for materials identified in the search warrant.

6. Defendant retains the right to move to suppress the Images of the Digital Media pursuant to Fed. R. Crim. P. 41.

So stipulated.

Respectfully submitted and agreed,

CHANNING D. PHILLIPS  
Acting United States Attorney  
D.C. Bar Number 415793

Date: \_\_\_\_\_ By: \_\_\_\_\_

**Graciela R. Lindberg**  
Assistant United States Attorney  
Detailee-Federal Major Crimes  
Texas Bar Number 00797963  
555 4th Street, N.W.  
Washington, D.C. 20530

Date: \_\_\_\_\_

**Aaron Mostofsky**  
Defendant

Date: \_\_\_\_\_

**Nicholas Smith**  
Attorney for Defendant

# EXHIBIT 2



Nicholas Smith <nds@davidbsmithpllc.com>

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## FW: Video upload

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Nicholas Smith <nds@davidbsmithpllc.com>

Mon, Jun 28, 2021 at 4:14 PM

To: "Lindberg, Graciela (USATXS)" <Graciela.Lindberg@usdoj.gov>, David Smith <dbs@davidbsmithpllc.com>

Thank you, Gracie. You'll recall that Judge Boasberg said it was reasonable to clarify in the phone return stipulation that a defendant does not waive the right to object that an image is not actually from his device. The judge said that in such a case, the government would simply have an agent testify about the process for extracting the image and would compare the image at issue with the original Cellebrite extraction.

Is the government amenable to making that clarification in the stipulation? If so, I will propose an edit. Thank you.

[Quoted text hidden]

# EXHIBIT 3



Nicholas Smith <nds@davidbsmithpllc.com>

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**FW: Video upload**

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**Lindberg, Graciela (USATXS)** <Graciela.Lindberg@usdoj.gov>

Mon, Jun 28, 2021 at 5:29 PM

To: Nicholas Smith <nds@davidbsmithpllc.com>, David Smith <dbs@davidbsmithpllc.com>

No edits to government prepared stipulation.

Your issue about what if something is not from the phone...

I believe the Judge was commenting that if it were not from the phone, than the stipulation would not apply. Re-read stipulation; it applies only to data/images taken from the device.

If you are still unsure, please reach out to DC-FPD, most of whom have no issues with stipulation.

[Quoted text hidden]

# EXHIBIT 4



Nicholas Smith <nds@davidbsmithpllc.com>

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**FW: Video upload**

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**Nicholas Smith** <nds@davidbsmithpllc.com>

Tue, Jun 29, 2021 at 9:22 AM

To: "Lindberg, Graciela (USATXS)" <Graciela.Lindberg@usdoj.gov>

Cc: David Smith <dbs@davidbsmithpllc.com>

Gracie, based on your representation in the below email, please see the attached signed stipulation. The device should be FedEx'd to my office below. Thank you.

Nicholas Smith  
7 East 20th Street  
Suite 4R  
New York, NY 10003

[Quoted text hidden]



**Stipulation re Return of Digital Devices-Mostofsky.pdf**

146K

# EXHIBIT 5

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	<b>CRIMINAL NO. 21-CR-138</b>
<b>v.</b>	:	
	:	
<b>AARON MOSTOFSKY</b>	:	
	:	
<b>Defendant.</b>	:	

**SECOND STIPULATION REGARDING RETURN OF DIGITAL MEDIA EVIDENCE  
AND ADMISSIBILITY AND USE OF DIGITAL MEDIA EVIDENCE**

The United States of America, by and through the undersigned, and defendant ARRON MOSTOFSKY (“Defendant”), by and through his counsel listed below, hereby agree and stipulate as follows:

**RECITALS**

On or about January 12, 2021, pursuant to Eastern District of New York Search Warrant, Case No. 21-M-28, and subpoena, government agents seized the defendant’s digital device belonging from Neil Mostofsky after executing a search warrant at the defendant’s residence for said device among other evidence. See attached Receipt for Property incorporated by reference in this Stipulation.

Defendant seeks return of specified digital media described below (the “Digital Media”).

Following this seizure, the government has imaged the Digital Media. The government has conducted and will continue to conduct a search of the imaged Digital Media (the “Images”).

The government intends to use materials discovered as a result of those searches as evidence in the pending and ongoing investigation and prosecution including, possibly, introducing those materials into evidence at trial or other proceedings.

Defendant has requested the return of the Digital Media listed below, and in the interest of expediting the return of the seized equipment and evidence, has agreed to stipulate to the following terms applicable to the specified Digital Media – itemized in the attached receipt.

### **DIGITAL MEDIA**

The Digital Media for which Defendant seeks return consist of Samsung Galaxy mobile phone/device, that was seized on January 12, 2021 from Neil Mostofsky.

### **STIPULATION**

Accordingly, the parties AGREE and STIPULATE as follows:

1. The government has agreed to return the Digital Media to defendant or defense counsel now that the Images of the Digital Media have completed.
2. The government will retain the Images of the Digital Media, including all evidence thereon, for use at trial and any other proceedings in this matter.
3. The Images of the Digital Media and/or any other copies are admissible at trial or any other proceeding in this matter to the same extent as the original Digital Media and evidence thereon (including original hard drive and computer disks), including but not limited to copies of the hard drive and printed copies of matters from the Digital Media.
4. Defendant waives any and all objections, and will not object, to the admissibility of the Images (and/or any portion of thereof) from the Digital Media on the grounds of foundation, authentication, and/or that the images are duplicates of, or not the original Digital Media, and/or any other objection under Articles IX and X of the Federal Rules of Evidence.
5. The government may retain and continue to examine the Images for materials identified in the search warrant.

6. Defendant retains the right to move to suppress the Images of the Digital Media pursuant to Fed. R. Crim. P. 41.

So stipulated.

Respectfully submitted and agreed,

CHANNING D. PHILLIPS  
Acting United States Attorney  
D.C. Bar Number 415793

Date: \_\_\_\_\_ By: \_\_\_\_\_

**Graciela R. Lindberg**  
Assistant United States Attorney  
Detailee-Federal Major Crimes  
Texas Bar Number 00797963  
555 4th Street, N.W.  
Washington, D.C. 20530

Date: 6/29/2021

/s/ Aaron Mostofsky

**Aaron Mostofsky**  
Defendant

Date: 6/29/2021

/s/ Nicholas D. Smith

**Nicholas Smith**  
Attorney for Defendant

# EXHIBIT 6



Nicholas Smith <nds@davidbsmithpllc.com>

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## FW: Video upload

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**Lindberg, Graciela (USATXS)** <Graciela.Lindberg@usdoj.gov>  
To: Nicholas Smith <nds@davidbsmithpllc.com>  
Cc: David Smith <dbs@davidbsmithpllc.com>

Tue, Jun 29, 2021 at 3:49 PM

We need actual signatures on the form. I've signed this one that is amended to include both search warrants and also references attached receipt form.

Thanks,

-Gracie Lindberg

[Quoted text hidden]

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### 2 attachments

 **Stipulation re Return of Digital Devices.MostofskyAmended.pdf**  
284K

 **ReceiptofPhone.pdf**  
75K

# EXHIBIT 7



Nicholas Smith <nds@davidbsmithpllc.com>

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## Stipulation Return of Phone

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**Lindberg, Graciela (USATXS)** <Graciela.Lindberg@usdoj.gov>  
To: Nicholas Smith <nds@davidbsmithpllc.com>  
Cc: David Smith <dbs@davidbsmithpllc.com>

Tue, Jun 29, 2021 at 4:16 PM

Let's try again. This one does not have typo in first paragraph. Sorry for inconvenience.

-Gracie

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**From:** Lindberg, Graciela (USATXS)  
**Sent:** Tuesday, June 29, 2021 2:50 PM  
**To:** Nicholas Smith <nds@davidbsmithpllc.com>  
**Cc:** David Smith <dbs@davidbsmithpllc.com>  
**Subject:** RE: Video upload

We need actual signatures on the form. I've signed this one that is amended to include both search warrants and also references attached receipt form.

Thanks,

-Gracie Lindberg

---

**From:** Nicholas Smith <nds@davidbsmithpllc.com>  
**Sent:** Tuesday, June 29, 2021 8:22 AM  
**To:** Lindberg, Graciela (USATXS) <GLindberg@usa.doj.gov>  
**Cc:** David Smith <dbs@davidbsmithpllc.com>  
**Subject:** Re: Video upload

Gracie, based on your representation in the below email, please see the attached signed stipulation. The device should be FedEx'd to my office below. Thank you.

Nicholas Smith  
7 East 20th Street  
Suite 4R  
New York, NY 10003

On Mon, Jun 28, 2021 at 5:30 PM Lindberg, Graciela (USATXS) <Graciela.Lindberg@usdoj.gov> wrote:

No edits to government prepared stipulation.

Your issue about what if something is not from the phone...

I believe the Judge was commenting that if it were not from the phone, than the stipulation would not apply. Re-read stipulation; it applies only to data/images taken from the device.

If you are still unsure, please reach out to DC-FPD, most of whom have no issues with stipulation.

---

**From:** Nicholas Smith <nds@davidbsmithpllc.com>

**Sent:** Monday, June 28, 2021 3:14 PM

**To:** Lindberg, Graciela (USATXS) <GLindberg@usa.doj.gov>; David Smith <dbs@davidbsmithpllc.com>

**Subject:** Re: Video upload

Thank you, Gracie. You'll recall that Judge Boasberg said it was reasonable to clarify in the phone return stipulation that a defendant does not waive the right to object that an image is not actually from his device. The judge said that in such a case, the government would simply have an agent testify about the process for extracting the image and would compare the image at issue with the original Cellebrite extraction.

Is the government amenable to making that clarification in the stipulation? If so, I will propose an edit. Thank you.

On Mon, Jun 28, 2021 at 10:54 AM Lindberg, Graciela (USATXS) <Graciela.Lindberg@usdoj.gov> wrote:

The Identification of officers involved in the 111 and 231 counts is provided in discovery. You have the name of two Metropolitan Police Officers (Sharp and Mustafa) as you have reviewed their BWC footage. See 302 dated 2/10/2021. As more officers are identified, their names and BWC (if any) will also be included in discovery. I will advise you via email when additional discovery is added.

In provided BWC videos of this incident, I count a number of officers and will ask agents to provide a more exact number to the extent possible.

Graciela R. Lindberg

Assistant U.S. Attorney

Capitol Riot Detailee District of Columbia

From Southern District of Texas, Laredo Division

Office: (956) 721-4960

Mobile: (956) 754-9350

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**From:** Nicholas Smith <nds@davidbsmithpllc.com>  
**Sent:** Monday, June 28, 2021 9:26 AM  
**To:** Lindberg, Graciela (USATXS) <GLindberg@usa.doj.gov>  
**Cc:** dbs\_davidbsmithpllc.com <dbs@davidbsmithpllc.com>  
**Subject:** Re: Video upload

Please provide the number of law enforcement officers involved in the 111 and 231 charges, and their identifying information. If you will not identify them, please provide your legal justification in writing. Thank you.

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**2 attachments**

 **Stipulation re Return of Digital Devices.Mostofsky-Amended.pdf**  
284K

 **ReceiptofPhone.pdf**  
75K

# EXHIBIT 8

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	<b>CRIMINAL NO.</b>
<b>v.</b>	:	
	:	
<b>AARON MOSTOFSKY</b>	:	
	:	
<b>Defendant.</b>	:	

**STIPULATION REGARDING RETURN OF DIGITAL DEVICES AND  
ELECTRONICALLY STORED INFORMATION**

The United States of America and defendant AARON MOSTOFSKY (“Defendant”) hereby agree and stipulate as follows:

**RECITALS**

1. On or about January 12, 2021, pursuant to court-authorized search warrants in Case No. 21-M-28 and Case No. 21-M-29 Eastern District of New York, government agents seized certain digital devices and electronically stored information, from searched residences and/or persons.

2. Defendant has requested the return of the following specified digital devices and electronically stored information (the “Digital Media”):

A Samsung Galaxy mobile phone/device seized on January 12, 2021. See attached Receipt of Property form.

3. The government has created an exact and accurate image (the “Image”) of the Digital Media specified in paragraph 2 by performing an extraction for the purpose of searching the Image.

4. The government intends to use materials discovered as a result of its search(es) as evidence in the pending and ongoing investigation and prosecution including, possibly, introducing those materials into evidence at trial or other proceedings.

#### **STIPULATION**

Accordingly, the parties AGREE and STIPULATE as follows:

1. The Images are accurate duplicates of the Digital Media and were created using reliable methods or Defendant waives the right to object to the admissibility of the Images of the Digital Media and the right to question witnesses or make arguments concerning the reliability of the methods used to create the Images.

2. The government will retain, and upon request will provide to defense counsel, the Images extracted from the Digital Media.

3. The Digital Media will be returned to defense counsel Nicholas Smith, as requested by defense counsel.

4. The government will retain the Images of the Digital Media, including all evidence thereon, for use at trial and any other proceedings in this matter.

5. The Images of the Digital Media and/or any other copies are “admissible [into evidence] to the same extent as the original,” within the meaning of Federal Rule of Evidence 1003.

6. The government may continue to examine the Images for materials identified in the Search Warrant consistent with the terms of the Search Warrant.

7. Defendant retains the right to challenge the Search Warrant and move to suppress the Images of the Digital Media pursuant to Fed. R. Crim. P. 41(h).

So stipulated.

Respectfully submitted and agreed,

CHANNING D. PHILLIPS  
ACTING UNITED STATES ATTORNEY  
D.C. Bar Number 415793

Date: \_\_\_\_\_ By:  \_\_\_\_\_  
**Graciela R. Lindberg**  
Assistant United States Attorney  
555 4th Street, N.W.  
Washington, D.C. 20530

Date: \_\_\_\_\_  
**Aaron Mostofsky**  
Defendant

Date: \_\_\_\_\_  
**Nicholas Smith**  
Attorney for Defendant